COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1206

MICHAEL J. TUOHEY, THIRD,

vs.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Michael J. Tuohey, Third, appeals from a summary judgment dismissing his complaint for employment discrimination and retaliation.[2] We affirm.

Background. We briefly summarize the facts in the light most favorable to the plaintiff, reserving other relevant facts for the discussion of the issues. See Godfrey v. Globe Newspaper Co., 457 Mass. 113, 119 (2010). Tuohey, a white male, was employed by the Massachusetts Bay Transportation Authority (MBTA) as a sergeant in its transit police department. When Tuohey was denied a promotion to lieutenant, he filed a complaint with the Massachusetts Commission Against

[1] William Killoran.

[2] Tuohey's complaint was filed against his former employer, the Massachusetts Bay Transportation Authority (MBTA), and a workers' compensation claims representative employed by the MBTA, William Killoran.

Discrimination (MCAD) alleging that he was denied the promotion based on his race.[3] Tuohey then filed a complaint in the Superior Court against the defendants (collectively, the MBTA) alleging that the MBTA denied him the promotion on the basis of his race and violated G. L. c. 152, § 75B, by taking retaliatory action against him because he had previously sought workers' compensation benefits. The MBTA moved for summary judgment on all counts. Following a hearing, the judge allowed the MBTA's motion for summary judgment, ruling that Tuohey's § 75B claims were time barred. The judge further determined that, although Tuohey's complaint alleged various retaliatory actions that were not time barred, he offered no admissible evidence in support of the allegations. Similarly, the judge concluded that Tuohey could not make a prima facie showing of discrimination in his failure to promote claim. This appeal followed.

Discussion. 1. Standard of review. We review a grant of summary judgment de novo. Roman v. Trustees of Tufts College, 461 Mass. 707, 711 (2012). In doing so, we consider the pleadings and other record evidence, viewing them in the light most favorable to Tuohey and drawing all reasonable inferences in his favor, to determine whether, on the undisputed facts, the

[3] The MCAD dismissed Tuohey's complaint on the ground that it was "unable to conclude that the information obtained establishes a violation of the [applicable] statutes."

MBTA is entitled to judgment as a matter of law. See id. at 710-711; Godfrey, 457 Mass. at 119. "[C]onclusory statements, general denials, and factual allegations not based on personal knowledge [are] insufficient to avoid summary judgment." O'Rourke v. Hunter, 446 Mass. 814, 821 (2006), quoting Cullen Enters., Inc. v. Massachusetts Prop. Ins. Underwriting Ass'n, 399 Mass. 886, 890 (1987). "Summary judgment is generally disfavored in cases involving employment discrimination because the question of intent requires a credibility determination." Godfrey, supra. However, summary judgment in favor of the employer may be appropriate where the employee fails to provide sufficient admissible evidence demonstrating "discriminatory intent, motive, or state of mind." Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 127 (1997).

2. Discrimination claim. A discrimination claim requires an employee to prove "membership in a protected class," together with "harm, discriminatory animus, and causation." Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 39 (2005). When proving a claim through indirect or circumstantial evidence, a plaintiff must first "establish a prima facie case of discrimination." Chief Justice for Admin. & Mgt. of the Trial Court v. Massachusetts Comm'n Against Discrimination, 439 Mass. 729, 732 (2003). Once a plaintiff does so, the employer bears the burden of providing a legitimate nondiscriminatory reason for its

decision, which shifts the burden of production back to the plaintiff to provide evidence that the employer's rationale for the termination is a pretext. Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 681 (2016). We conclude that on this record Tuohey did not establish a prima facie case of discrimination.

To make out a prima facie case of discriminatory denial of a promotion, Tuohey must demonstrate that (1) he was a member of a protected class; (2) he was qualified for a lieutenant promotion; (3) he was considered for and denied a promotion; and (4) at the time the MBTA denied him a promotion, it promoted another employee of similar qualifications who was not a member of the protected class. See Radvilas v. Stop & Shop, Inc., 18 Mass. App. Ct. 431, 439-440 (1984). Here, Tuohey cannot demonstrate that he was qualified for the position or that the MBTA promoted a nonwhite candidate of similar qualifications over him.

Having passed the October 2009 examination required for a promotion to lieutenant, Tuohey was eligible for this promotion between March 2010 and March 2012. For the promotion that occurred in 2011, three individuals (all white males) were on the eligibility list; Tuohey was placed last on the list due to his test score. Because the individual who was promoted in 2011 had a higher test score than Tuohey, scored higher in his interview, and was also white, Tuohey cannot establish a prima

facie case of discriminatory denial of a promotion as of 2011. See Delva v. Brigham & Women's Hosp., Inc., 72 Mass. App. Ct. 766, 770 (2008) (plaintiff could not establish prima facie case where, "[o]n the undisputed facts in the summary judgment record, no jury could reasonably conclude that [the plaintiff's] qualifications were similar, i.e., roughly equivalent, or more or less comparable, to those of [the promoted employee]").

Tuohey did not pass the October 2011 examination, rendering him ineligible for promotion from April 5, 2012, to sometime in March or April 2014. Accordingly, Tuohey cannot show that at the time he was denied promotion in June 2012, the MBTA promoted employees with similar qualifications, because the five employees who were promoted had passed the examination.[4] See id.

Nonetheless, Tuohey contends that there is an inference of discriminatory intent based on inconsistent conversations that he had with certain supervisors regarding the promotion. Tuohey claims that between December 2011 and April 2012, the MBTA could have promoted him to lieutenant, but did not, alleging that the MBTA intentionally waited until the April 2012 list was released (based on the October 2011 test scores) so that "promotions could be made from a new list having qualified minority candidates." There is, however, nothing contained in the record

[4] Two of the applicants promoted in 2012 were African-American and one was Asian.

supporting an inference that the MBTA harbored such an intent. Additionally, the MBTA's promotion of two white individuals from the April 2012 list along with the other qualified minority candidates demonstrates that its intent was not racially motivated. The conversations Tuohey had with the MBTA regarding the promotion, even if contradictory, do not give rise to a permissible inference of any discriminatory animus based on race. See Lipchitz v. Raytheon Co., 434 Mass. 493, 504 (2001) ("in indirect evidence cases the plaintiff must prove that the defendant's discriminatory animus was the determinative cause"). Indeed, "we have upheld summary judgment in favor of an employer where 'the plaintiff is unable to offer admissible evidence of the [employer's] discriminatory intent, motive, or state of mind.'" Sullivan, 444 Mass. at 39, quoting Matthews, 426 Mass. at 127.

3. Retaliation claim. The parties agree that Tuohey's retaliation claim brought under G. L. c. 152, § 75B, is governed by a three-year statute of limitations.[5] We apply, by way of analogy, the law governing limitations periods in the employment discrimination context. In such a case, the limitations period begins to run at the time of the act of discrimination. See Ocean Spray Cranberries, Inc. v. Massachusetts Comm'n Against

[5] Because the parties agree, we need not examine the question.

Discrimination, 441 Mass. 632, 641 (2004). For example, in a disability discrimination case involving denial of a promotion, the operative moment is the date of the denial. See id. Tuohey alleges that he could have been promoted through March 2012, but his complaint was not filed until June 11, 2015. In 2009, after Tuohey was denied workers' compensation benefits, he filed a complaint with the MCAD and litigated and defended his claims.[6] To the extent Tuohey relies on retaliatory acts alleged in his 2009 MCAD complaint to support his retaliation claim, he plainly knew about those acts in 2009, when that complaint was filed. As to Tuohey's argument concerning alleged retaliatory conduct that occurred between June 2012 (three years prior to the filing of this action) and 2014, he has failed to put forth sufficient or admissible evidence in support of any retaliation that took place in that period. Although Tuohey argues on appeal that the MBTA's failure to promote him was retaliatory, he failed to make this argument in the trial court, and thus it is waived.[7] See Century Fire & Marine Ins. Corp. v. Bank of New England-Bristol County, N.A., 405 Mass. 420, 421 n.2 (1989) ("An issue not

[6] The MCAD dismissed Tuohey's complaint for lack of probable cause.

[7] Tuohey asserts that his complaint incorporated all preceding factual allegations into his counts for violation of G. L. c. 152, § 75B. He does not, however, point to any evidence that he argued nonpromotion was a form of retaliation for his workers' compensation claims at the summary judgment stage.

raised or argued below may not be argued for the first time on appeal"). Therefore, summary judgment on the retaliation claim was proper. See Piderit v. Siegal & Sons Invs., Ltd., 55 Mass. App. Ct. 1, 5 (2002) ("the plaintiff fails for want of any showing in the summary judgment materials that his discharge was related to workers' compensation").

Judgment affirmed.

By the Court (Desmond, Sacks & Lemire, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: June 14, 2019.

[8] The panelists are listed in order of seniority.